



# Montana Board of Environmental Review

P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: [www.deq.state.mt.us](http://www.deq.state.mt.us)

## AGENDA

### BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, DECEMBER 1, 2006

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

**NOTE:** Individual agenda items are not assigned specific times. For public notice purposes, the Board will begin the meeting no earlier than the time specified. However, the Board might not address the specific agenda items in the order they are scheduled. Persons with disabilities, who need an accommodation in order to participate in this meeting, should contact the Board Secretary at (406) 444-2544.

**9:00 A.M.**

## **I. ADMINISTRATIVE ITEMS**

### **A. REVIEW AND APPROVE MINUTES**

1. September 15, 2006, regularly scheduled Board meeting.
2. October 11, 2006, teleconference meeting regarding the Mercury rules.

**Draft Minutes**

3. October 16, 2006, teleconference meeting regarding final adoption of the Mercury rules.

**Draft Minutes**

### **B. SET 2007 MEETING SCHEDULE**

**Executive Summary for Setting of the 2007 Meeting Schedule**

## **II. BRIEFING ITEMS**

### **A. CONTESTED CASE UPDATE**

1. Cases assigned to Hearing Officer Katherine Orr
  - a. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.** The Hearing Examiner, upon request of the parties, has vacated the hearing schedule and placed the case on hold until further notice of one or more of the parties or upon initiative of the Hearing Examiner.
  - b. **In the matter of Violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.** The Board received a request for hearing regarding an Administrative Penalty Order issued by DEQ for the alleged failure to pay annual permit fees on the MGWPCS permit for discharges from the Paymaster Mine Adit located in Lewis and Clark County. DEQ claims ASARCO should have paid permit fees for a permit that ASARCO argues should have been terminated in 2002. The Hearing Examiner issued a Stay of Proceedings on January 19, 2006, upon the notification of the Department of the bankruptcy proceeding.
  - c. **In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.** On June 6, 2005, the Montana Supreme Court remanded an appeal to the District Court. On June 15, 2005, the district Court remanded the case to the Board. The Board was to decide whether to make a new decision based on the record or to receive additional evidence. On July 29, 2005, the Board issued an Order Staying Contested Case Proceedings indefinitely. On August 24, 2005, Hearing Examiner Katherine Orr issued an Assumption of Jurisdiction referencing the Order Staying Contested Case Proceedings.
  - d. **In the matter of the request for hearing of Bruce Wood, d/b/a Big Sky Ready Mix, regarding a notice of violations of the Opencut Mining Act, BER 2006-06 OC.** The Board received the request for hearing March 16, 2006. A contested case hearing was held November 14, 2006.

- e. **In the matter of the request for hearing of Tom and Noel Gorton, d/b/a Creston Topsoil, regarding a notice of violations of the Opencut Mining Act, BER 2006-07 OC.** The Board received the request for hearing on March 21, 2006. A telephone conference was held with the parties on November 13, 2006. The parties will provide a status report on settlement and discovery on November 20, 2006.
- f. **In the matter of the request for hearing of Kountry Korner Enterprises, d/b/a Kountry Korner Café, regarding violations of the Montana Public Water Supply Laws, BER 2006-09 PWS.** The Board received the request for hearing March 27, 2006. A hearing will be held on November 28, 2006. By Stipulation, the proceedings are stayed until December 20, 2006.
- g. **In the matter of the Montana Environmental Information Center's appeal of Air Quality Permit No. 3182-01, issued for the Roundup Power Project, BER 2005-21 AQ.** The parties have requested a hearing in January 2007. Bull Mountain filed a Motion for Summary Judgment on October 27, 2006. MEIC filed a Motion for Summary Judgment on October 30, 2006. On November 9, 2006, Bull Mountain filed the Permittee Bull Mountain's Brief in Opposition to MEIC's Motion for Summary Judgment. On November 13, 2006, the Department filed the Department of Environmental Quality's Brief in Answer to Motions for Summary Judgment.
- h. **In the matter of the appeal by Willow Creek Sewer District regarding violations of the Water Quality Act, BER 2006-13 WQ.** The Board received the appeal May 23, 2006. The parties have requested until November 30, 2006, to either submit a settlement agreement or a proposed schedule.
- i. **In the matter of the request for hearing of the Teton County Airport Commission regarding violations of the Montana Underground Storage Tank Act at the Choteau Airport, BER 2006-15 UST.** The Board received the request for hearing June 2, 2006. A hearing is scheduled for January 8, 2007. The Department filed a Motion for Extension of Time to File Motion, To Compel Discovery and for a Ruling on the Sufficiency of Discovery with Supporting Brief on October 2, 2006. On October 4, 2006, the Department filed a Partial Withdrawal of Motion because the Department received Petitioner's supplemental responses to the Department's First Request for Discovery. On October 12, 2006, the Department filed a Motion for Partial Summary Judgment with Supporting Brief. No response was filed by the Petitioner.
- j. **In the matter of the request for hearing of U.S. Customs and Border Protection regarding a notice of violation concerning the Del Bonita Border Station, BER 2006-16 PWS.** The Board received the request for hearing June 8, 2006. A Scheduling Order was issued on September 27, 2006. A hearing is scheduled for March 27, 2007.
- k. **In the matter of the Notice of Appeal and Request for Hearing of the Citizens Awareness Network, Women's Voices for the Earth, and the Clark Fork Coalition regarding DEQ's approval of the Thompson River CO-Gen, LLC, Air Quality Permit No. 3175-04, BER 2006-18 AQ.** The Board received the appeal via fax on September 5, 2006. A Scheduling Order was issued on October 31, 2006. A hearing will be held on May 3 and 4, 2007.

#### B. CASES IN LITIGATION

1. **In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleum, Inc. (BER 2003-14 HW).** Flying J requested a hearing under the Montana Hazardous Waste Act to review the final decision of DEQ to issue a Hazardous Waste Final Permit to Flying J for its former refinery located near Cut Bank. A Petition for Judicial Review was filed by Flying J on August 18, 2006. On September 13, 2006, the Board Secretary mailed a certified copy of the record to the Ninth Judicial District Court. The certified record was received by the court September 14, 2006. On October 3, 2006, the Board Secretary found that the exhibits to the Petition for Review had been omitted from the original submission and sent a certified copy of the exhibits to the court. On September 27, 2006, the Board filed a Motion to Dismiss the Board. Flying J filed a response opposing the Motion to Dismiss on October 12, 2006. On November 9, 2006, the Board filed a Reply in Support of Motion to Dismiss.

C. OTHER BRIEFING ITEMS

1. Gallatin ORW - The Department will brief the Board on the progress of this rulemaking.

III. ACTION ITEMS

A. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

1. In the matter of the repeal of ARM 17.30.630(2) to revoke the temporary water quality standards for portions of the Mike Horse Creek, Beartrap Creek and the Upper Blackfoot River. The Board initiated rulemaking at its June 2 Board meeting and Presiding Officer Katherine Orr held a public hearing on September 19 in Lincoln.

Executive Summary

Notice of Public Hearing on Proposed Amendment

Notice of Amendment

B. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER

The Department will propose that the Board concur in its recommendation to initiate rulemaking to:

1. Amend ARM 17.30.1303 and 17.30.1330 to adopt revised federal concentrated animal feeding operations (CAFOs) rules as promulgated in the Code of Federal Regulations Part 412 and Part 122. The proposed amendments would extend the date by which owners and operators must seek permit coverage, from February 13, 2006, to July 31, 2007. The proposed amendments would also extend the deadline by which CAFOs are required to develop and implement nutrient management plans, from December 31, 2006, to July 31, 2007.

Executive Summary

Notice of Public Hearing on Proposed Amendment

C. FINAL ACTION ON APPEALS

1. **In the matter of the request for hearing of Jay Gasvoda, d/b/a Gasvoda Construction, BER 2005-17 OC, regarding the Notice of Violation and Statement of Proposed Penalty issued by DEQ on September 14, 2005.** On October 6, 2005, the Board received the appeal letter from Mr. Gasvoda appealing the issuance of a Notice of Violation and Statement of Proposed Penalty concerning an opencut mining operation. On September 29, 2006, the parties filed a Stipulation to Dismiss. A proposed order to dismiss the case will be presented for the Board's approval.
2. **In the matter of the request for hearing of James McDonald, d/b/a McDonald Ready Mix, regarding violations of the Opencut Mining Act, BER 2006-05 OC.** The Board received a request for hearing March 10, 2006. The parties signed a Stipulation to Dismiss and Dismissal Order in October 2006. An order dismissing the case will be presented to the Board for approval.
3. **In the matter of the request for hearing of Michael Golembeski regarding the permit process of the Paveco Gravel Pit, BER 2006-14 OC.** The Board received the request May 26, 2006. On July 18, the Department filed a Motion to Dismiss. The Petitioner filed an answer on August 10, 2006, and the Department's reply was filed August 11, 2006. The Hearing Examiner issued a proposed Order granting the Department's Motion to Dismiss for the Board's review and approval. The Petitioner has been given notice that he may file exceptions and present oral argument at the Board meeting.
4. **In the matter of the request for hearing of Robert Klein, Clancy School District No. 1, BER 2006-17 PWS, regarding violations of the Montana Public Water Supply Laws.** The Board received the request for hearing on August 25, 2006. On November 1, 2006, the parties submitted a Stipulation to Dismiss, a Notice of Violation and Administrative Order on Consent. A proposed Order of Dismissal is provided for the Board's review.

5. **In the matter of the request for hearing of On Your Way, Inc., regarding violations of the Montana Underground Storage Tank Act, BER 2006-19 UST.** The Board received the appeal on August 30, 2006. The hearing examiner issued a First Prehearing Order on September 14, 2006. On September 25, 2006, the Board received a letter from Bruce Wheatley withdrawing his appeal. The Department filed a Motion to Dismiss on September 26, 2006. A proposed order to dismiss the case will be presented for the Board's approval.
6. **In the matter of violations of the Metal mine Reclamation Act by David Olmstead, BER 2006-26 MM.** The Board received the request for hearing on October 24, 2006. Mr. Olmstead has indicated his desire to withdraw his appeal. The DEQ filed a Motion to Dismiss on November 16, 2006. An order for dismissal will be presented for the Board's approval.

D. NEW CONTESTED CASE APPEALS:

1. **In the matter of violations of the Montana Underground Storage Tank Act at Elliston Store, BER 2006-20 UST.** The Board received a request for hearing on September 6, 2006. A Scheduling Order was issued by Standing Interim Hearing Examiner Katherine Orr on September 27, 2006, and again on October 4, 2006, to effect a minor correction. The Board may appoint a permanent hearing examiner or decide to hear the matter.
2. **In the matter of violations of the Metal Mine Reclamation Act by Marty J. and Sinda M. Puryer, as individuals and d/b/a Paul Kurth Mining, for the failure to post reclamation bond, BER 2006-21 MM.** The Board received the request for hearing on September 20, 2006. Standing Interim Hearing Examiner Katherine Orr issued a First Prehearing Order on November 14, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.
3. **In the matter of the appeal by Dan Fuchs, Broken 7 Subdivision, regarding Gallatin City-County Health Department's denial of a request to change a provision of the original certificate of subdivision approval, BER 2006-22 SUB.** The Board received the appeal on September 27, 2006. Standing Interim Hearing Examiner Katherine Orr issued a First Prehearing Order on October 31, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.
4. **In the matter of the appeal by the City of Bozeman regarding the DEQ's final decision for MPDES Permit No. MT0022608, BER 2006-23 WQ.** The Board received the appeal on September 29, 2006. Standing Interim Hearing Examiner Katherine Orr issued a First Prehearing Order on October 31, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.
5. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by BMP Investments, Inc., at the Bull Mountains Mine #1, BER 2006-24 SM.** The Board received the request for hearing on October 10, 2006. Standing Interim Hearing Examiner Katherine Orr issued a First Prehearing Order on October 31, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.
6. **In the matter of the appeal by Wesley Gillespie regarding the 2006 fee for MPDES Permit No. MTG370275, BER 2006-25 WQ.** The Board received the request for hearing on October 24, 2006. Standing Interim Hearing Examiner Katherine Orr issued a First Prehearing Order on November 15, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.
7. **In the matter of the appeal by the Butte-Silver Bow Public Works Department, regarding Final MPDES Permit No. MT0022012, BER 2006-27 WQ.** The Board received the request for hearing on November 1, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.
8. **In the matter of violations of the Water Quality Act at Cenex Harvest States fueling facility on Highway 83, Condon, BER 2006-28 WQ.** The Board received the request for hearing on November 6, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.

9. **In the matter of violations of the Water Quality Act and the Public Water Supply Laws by Brady County Water and Sewer District, BER 2006-29 WQ.** The Board received the appeal on November 13, 2006. The Board may appoint a permanent hearing examiner or decide to hear the matter.

**IV. GENERAL PUBLIC COMMENT**

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

**V. ADJOURNMENT**



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## **TELECONFERENCE MINUTES OCTOBER 11, 2006**

### Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 12:05 p.m., on Wednesday, October 11, 2006, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

### Attendance

Board Members Present: Robin Shropshire

Board Members Present via Telephone: Chairman Joseph Russell, Don Marble, Bill Rossbach, Gayle Skunkcap, Kim Lacey, Heidi Kaiser and Robin Shropshire

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Cheryl Romsa, Cheryl Romsa Court Reporting

Department Personnel Present: Richard Oppen, Director; Tom Livers, Deputy Director; Lisa Peterson, Director's Office; John North, Chief Legal Counsel; David Rusoff, Legal; Don Vidrine, Air Resources Management Bureau (ARMB), Permitting & Compliance Division (PCD); Charles Homer, ARMB, PCD; Debbie Skibicki, ARMB, PCD; David Klemp, ARMB, PCD; Jeff Blend, Planning, Prevention & Assistance Division.

Interested Persons Present (in person or via telephone): Steve Wade, BKBH; Mark Lambrecht, PPL Montana; Jim Parker, PPL Montana; Leo Berry, GWP; Tim Gregori, Southern Montana Electric; Joe Lierow, Bison Engineering; Candace Payne, Southern Montana Electric; Dave Kelsey, Southern Montana Electric; Brandon Wittman, Yellowstone Valley Electric; Jeff Chaffee, Bison Engineering.

I In the matter of the amendment of ARM 17.8.740 and 17.8.767 and the adoption of New Rules I and II pertaining to control of mercury emissions from facilities that combust coal to generate electricity for sale and adoption of the cap and trade provisions of the federal Clean Air Mercury Rule.

Mr. Livers recommended a motion to adopt the rule as distributed and that further discussion could then continue; that there be some limited public comment, due to the recent changes in the proposed rule; and that any new changes to the proposed rule be dealt with individually in nested motions. He indicated that some of the changes might also necessitate changes to the responses to comments and to the 521/311 analyses, and suggested a very brief subsequent teleconference on Monday for final approval.

Chairman Russell called for a motion to adopt the rule as proposed. Ms. Kaiser so MOVED. Ms. Lacey SECONDED the motion. The motion was amended to be contingent upon the Board's approval of the entire rule package at the teleconference on Monday.

Mr. North identified a housekeeping amendment on page 3, subsection (3). He suggested that item (c) become subsection (4), that subsection (4) become subsection (5), etc. Mr. Rossbach MOVED to make the amendment. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Rossbach suggested there was concern regarding the BACT analysis requirement, that it might allow the DEQ to require a different boiler technology after the plant was built. He MOVED to add language at section (1)(c), (2)(iv), and at (2)(b), (iv). Ms. Kaiser SECONDED the motion. Mr. Livers clarified that the language would be added to section (1)(c) and immediately after section (1)(b) at (iv). Further discussion took place. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Gregori asked that the Board consider adding the language to sections (8) and (9) also.

Mr. Berry requested that the Board clarify in the responses to comments that the boiler technology to be used is part of the application process and is not selected by the agency or the Board.

Mr. Livers identified where the additional language should be added in sections (8) and (9), as Mr. Gregori had suggested. Further discussion took place regarding placement of the language. Mr. Rossbach MOVED for the addition of the language in the two newly identified places. Ms. Lacey SECONDED the motion.

Chairman Russell called for public comment on this issue. Mr. Gregori said the suggested placement creates more confusion than it resolves. Mr. Berry commented that the language is not needed, and recommended the Board withdraw the amendment.

Chairman Russell called for a VOTE to place the additional language in the two

newly identified places. The motion CARRIED unanimously.

Discussion took place regarding possible language to address newly proposed plants. The Board decided to not deal with this issue at this time.

Discussion took place regarding AELs after 2018. Ms. Shropshire MOVED that the numbers and the cap-and-trade portion of the rule be identical for all types of coal in Montana, for new non-existing facilities. Mr. Skunkcap SECONDED the motion. Further discussion took place.

Chairman Russell called for public comment. Mr. Berry spoke against the motion. The motion FAILED with a 4-3 VOTE.

Chairman Russell called for public comment on the original motion to adopt the rule, with the nested amendments. Mr. Lambrecht commented regarding the allowances, BACT review, and the Economic Impact Statement. Mr. Kelsey spoke in favor of the language additions.

Chairman Russell confirmed Ms. Kaiser and Ms. Lacey's concurrence with the amendments made to the original motion and called for a VOTE on the original motion with amendments. The motion CARRIED 5-2.

## II. General Public Comment

Chairman Russell called for general public comment. There was no response.

The Board decided the subsequent teleconference on regarding final action on the mercury rules would take place Monday, October 16, 2006, at Noon.

A brief discussion took place regarding the October 25, 2006, Gallatin ORW rule hearing.

## III. Adjournment

Mr. Skunkcap MOVED to adjourn. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 2:22 p.m.

Board of Environmental Review October 11, 2006, teleconference minutes approved:

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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

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DATE